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JOHN T. FEY, C

Supreme Court of the United States

OCTOBER TERM, 1956
No. 269, Miscellaneous

JAMES FRANKLIN BOWMAN - - - - Petitioner

v.

COMMONWEALTH OF KENTUCKY - - Respondent

MOTION TO DISMISS
and
BRIEF FOR RESPONDENT

JO M. FERGUSON
Attorney General

ZEB A. STEWART
Assistant Attorney General
Counsel for Respondent
Commonwealth of Kentucky

I hereby certify that I have mailed a true copy of the within motion to dismiss and brief for respondent to James Franklin Bowman at the Kentucky State Penitentiary, Eddyville, Kentucky, this the 5th day of October, 1956.

Zeb A. Stewart
Assistant Attorney General
Frankfort, Kentucky

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JAMES FRANKLIN BOWMAN - - - - - - - - *Petitioner*

V.

COMMONWEALTH OF KENTUCKY - - - - - *Respondent*

MOTION TO DISMISS

and

BRIEF FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT CONSTITUTING THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

Respondent moves the Court to dismiss the petition for writ of certiorari for the following reasons:

1. The Supreme Court of the United States is without jurisdiction to review the decision of the Court of Appeals of Kentucky in its opinion of March 16, 1956, reported in 290 S. W. 2d 814, Advance Sheets No. 4 of July 10, 1956, affirming petitioner's judgment and sentence of death for the wilful murder of Mrs. Roberta Busby imposed by the Jefferson Circuit Court, Criminal Branch, Second Division, Hon. L. R. Curtis, Judge. Rehearing was denied June 22, 1956.

The Kentucky Court of Appeals has entered an order which appears in the record transmitted to the Clerk of this Court staying petitioner's execution until and including November 26, 1956, pending a hearing or disposition of this cause by this honorable Court at its October Term, 1956.

Since petitioner is proceeding in this Court in forma pauperis, the original record of the Kentucky Court of Appeals was transmitted to the Clerk of the Supreme Court some time in the latter part of August or first of September, 1956.

2. No federal question was presented below and none is now presented in this Court such as would warrant this Court to grant the writ of certiorari to review the decision of the Court of Appeals of Kentucky.

This court has in a long line of decisions extending over many years steadfastly adhered to the following well-known rule of law, viz:

Where a conviction for a violation of a state statute has been affirmed by the court of last resort of that state and has been conducted according to long established precedent and rules of evidence, there is no such denial of the due process clause of Section 14 or any other section of the Federal Constitution invoked by petitioner such as to warrant granting certiorari to review the action of the Court of Appeals of Kentucky in affirming petitioner's conviction.

Howard v. Kentucky, 200 U. S. 164; Gilbert Tinsley v. Commonwealth of Kentucky, Writ of Certiorari denied October 12, 1953, 74 S. Ct. 22; Ed Milam v. Commonwealth of Kentucky, Writ of Certiorari denied June 6, 1955, 75 S. Ct., 897; Chester Merrifield v. Commonwealth of Kentucky, 75 S. Ct. 360; Leonard Tarrence v. Commonwealth of Kentucky, 75 S. Ct. 220; Tommy Nelson v. Commonwealth, 65 S. Ct. 86; Bass v. Commonwealth, 65 S. Ct. 64; Bircham v. Commonwealth, 72 S. Ct. 55.

BRIEF FOR RESPONDENT

Statement of the Case

The indictment was for wilful murder under Section 435.010 of the Kentucky Revised Statutes. Petitioner James Franklin Bowman, on the night of Saturday, August 28, 1954, raped Mrs. Roberta Busby, a 72 year old woman, in her apartment in the City of Louisville where he had been employed by his victim to do odd jobs. When Mrs. Busby threatened to have Bowman arrested for this rape, he picked up a pair of scissors and stabbed her several times in the throat, killing her. Her body was found about 2:30 a. m. on Sunday, August 29, 1954. Deceased had bled profusely and her clothing had been pulled up so that her body was nude from the waist down. Her purse containing $37.00 and a large bottle containing about $10.00 in coins were undisturbed, evidential of the fact that robbery was not necessarily the motive for the crime but lust and passion were.

Bowman made a free, voluntary, written and signed confession to police officers shortly after the crime, giving the details thereof in full. We quote from this statement:

> "I have made this statement on my own free will, with out threats or promises and had same read to me by Detective A. J. Miller as I can not read. After it was read to me, I find that it is true to the best of my knowledge and have signed same."

Argument and Authorities

It will be noted from the remarkably able opinion written for the Kentucky Court of Appeals by Justice Montgomery that the questions raised by petitioner's eminent counsel who represented him in the trial court and on his appeal to the Court of Appeals of Kentucky are as follows:

1. The confession was improperly admitted in evidence.
2. The evidence was insufficient to sustain the verdict.
3. The argument of the prosecuting attorney was improper.
4. The jury was allowed to separate improperly.

All of these questions involved only questions of Kentucky law and procedure. Not a single federal question was raised or involved either in the trial court or in the Kentucky Court of Appeals. Not a single federal case was cited or discussed in the brief submitted by appellant's counsel on the appeal to the Court of Appeals.

Beyond the mere general and non-specific allegations in the petition for certiorari to the effect that petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution have been violated, we find from petitioner's index to his points and authorities on pages 1 and 2 thereof attached to his petition that not a single Supreme Court or any federal case has been cited either to show jurisdiction or adjudicated authority to warrant the granting of the writ of certiorari applied for. Petitioner does cite Section 11 of the Constitution of Kentucky which provides that a defendant in a criminal case shall not be compelled to be a witness against himself. There is nothing in the evidence in this case or the report of the official stenographer who reported the proceedings of the trial in the circuit court to show that Bowman was compelled to be a witness against himself. In fact, his brief in this Court at page 5 contains the following recitation, to-wit:

> "The petitioner did not take the stand in either trial."

Petitioner cites 16 cases from the Kentucky Court of Appeals in the index to his brief under points and authorities. He cites several sections of the Kentucky Criminal Code, three or four cases from other states, and one or two textbook citations. None of these are applicable to sustain his contentions even should this Court take jurisdiction or review the case and write an opinion.

The well-written opinion of Judge Montgomery cites an abundance of Kentucky authority on every point contended for in the Kentucky Court of Appeals and in this Supreme Court. We quote below the concluding part of the opinion of the Court of Appeals:

> "In view of the death sentence involved in the instant case, and of our rule in such cases, the record has been studied carefully, and leniency has been extended appellant in considering the alleged errors. It is recalled that our rule in death sentence cases requires only that prejudicial errors shown in the record be considered. We have gone beyond the limits of the rule in this case and have examined alleged errors which were not contained in the record but which appeared only in appellant's brief. This is not to be considered as an extension of, or deviation from, our rule, but is indicative only of the extent of our consideration of the case. We have thus concluded that appellant received a fair and impartial trial which was free from prejudicial error.
>
> "Judgment affirmed."

The petition for certiorari and argument advanced to support it merely contain broad, general and non-specific allegations to the effect that petitioner's constitutional rights guaranteed under the Fifth, Sixth and Fourteenth Amendments of the Federal Constitution have been violated. He contends that this Court has jurisdiction to grant the writ of certiorari prayed under Rule 19 of this Court. Respondent denies this. We quote below Sections 1 and 1(a) of Supreme Court Rule No. 19, as follows:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

There is no federal question presented or involved here not in the trial court or the Kentucky Court of Appeals. No constitutional question, either state or federal, is involved which would warrant granting certiorari.

Fifty years ago Your Honors, in the case of Howard v. Kentucky, 200 U. S. 164, wrote an opinion which has been followed since without variation or shadow of turning. Voluminous precedent from many courts was cited in the Howard opinion. We quote below from the syllabus the substance of that holding:

"The provisions of the Fifth and Sixth Amendments to the Federal Constitution do not apply to proceedings in the state courts.

"A state cannot be deemed guilty of violating its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, if acting within its jurisdiction.

"While the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights, the Amendment was not intended to interfere with the power of the State to protect the lives, liberty and property of its citizens, nor with the power of adjudication of its courts in administering the process provided by the law of the State."

The cases cited in the motion herewith to dismiss the petition for writ of certiorari are also invoked and relied on in the event the Court should see fit to take jurisdiction and review the case by the grant of certiorari sought by petitioner.

CONCLUSION

It is therefore insisted that the motion to dismiss for want of jurisdiction should be sustained; that in no event should certiorari issue.

Respectfully submitted,

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Commonwealth of Kentucky